IN THE SUPREME COURT OF FLORIDA

CITY OF DAYTONA BEACH, et al.,

Petitioners,

vs.

LAURA HUHN,

Respondent.

SUPREME COURT CASE NO. 65,454

D. C. A. CASE NO. 82-1150

BRIEF OF PETITIONERS CITY OF DAYTONA BEACH AND INSURANCE COMPANY OF NORTH AMERICA ON THE MERITS

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BRIEF OF PETITIONERS CITY OF DAYTONA BEACH
AND INSURANCE COMPANY OF NORTH AMERICA
ON THE MERITS

In this Brief petitioner City of Daytona Beach will be referred to as the "City". Respondent Laura Huhn will be referred to as "Huhn".

The following symbols will be used:

"A" -- Appendix to Brief of Petitioners City of Daytona Beach and Insurance Company of North America.

STATEMENT OF THE CASE

In her Amended Complaint,[1] Huhn seeks to recover damages for injuries which she allegedly sustained on June 8, 1979 when she was struck by a car while walking on the beach at Daytona Beach.

To said Complaint, the City filed a Motion to Dismiss[2] on the ground that said Complaint failed to state a cause of action upon which relief could be granted in that:

1. Said Complaint failed to allege sufficient ultimate facts to establish a duty on the part of the defendant City to Huhn different from that owed to any member of the public and, therefore, said defendant was not liable to Huhn as a matter of law.

2. From the allegations of said Complaint it appears that any negligent act or omission by the City in establishing when and under what circumstances motor vehicles may travel on the Atlantic Ocean beach at Daytona Beach is a governmental decision for which the

1. R-13
2. R-28

defendant City could not be held responsible as a matter of law.

On July 21, 1982 an Order[3] was entered granting the City's Motion to Dismiss

Thereafter, Huhn filed a Motion for Rehearing[4] and on August 6, 1982 an Order[5] was entered denying Huhn's Motion for Rehearing and amending the trial judge's previous Order of July 21, 1982 to provide that said Complaint was dismissed with prejudice.[6]

An appeal was taken from said Order dismissing the Amended Complaint with prejudice to the District Court of Appeal of Florida, Fifth District, which in an opinion filed May 17, 1984 reversed the Order of the trial court.

In an Order dated October 24, 1984 this Court accepted conflict jurisdiction as authorized by Rule of Appellate Procedure 9.030(a)(2)(A)(i)(v).

STATEMENT OF FACTS

Since this appeal is from an Order granting a Motion to Dismiss Huhn's Amended Complaint, the facts contained therein are assumed for purposes of this Brief to be true.

The relevant allegations of the Complaint insofar as the City is concerned are:

"On the evening of June 8, 1979, shortly prior to the accident as described in Count I above, the City of Daytona Beach, acting by and through officers of the Police Department within scope and course of their employment with said City, did stop the Defendant, TIMMY LYNN COLLINS, while recklessly and carelessly operating his motor vehicle.

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3. R-51
4. R-55
5. R-56
6. R-56

That when the Defendant was stopped by police officers of the City of Daytona Beach, as described in paragraph 15 above, said police officers did observe that said Defendant, COLLINS, was operating a motor vehicle while intoxicated and otherwise physically unfit, due to alcohol consumption, to be operating a motor vehicle, all in clear and flagrant violation of the laws of the State of Florida;

That despite such observations and knowledge on the part of said police officers, the Defendant, COLLINS, was not detained, arrested, charged or otherwise prevented from continuing to operate his motor vehicle while in an intoxicated state and shortly thereafter at a time contemporaneous to the release of COLLINS by the municipal police officers, the Defendant, COLLINS, while in his intoxicated state did operate his vehicle by running same at forty-five miles per hour down the ocean sands of the beach in a gross, wilful and wanton manner, striking the Plaintiff who was walking on the beach legally."

It is further alleged in said Complaint that the release of the defendant Collins by City police officers was a breach of duty owed to Huhn and that said breach proximately resulted in injury and damage to said plaintiff.

ARGUMENT

QUESTION

CAN A CITY BE HELD LIABLE FOR FAILURE OF ITS POLICE OFFICER TO PREVENT RECKLESS OPERATION OF A MOTOR VEHICLE BY A DRIVER WHO IS KNOWN BY SAID POLICE OFFICER TO BE UNDER THE INFLUENCE OF ALCOHOL?

The above question was answered in the negative by the Fifth District Court of Appeal.

In its opinion, said court acknowledges that its decision is in conflict with the decision of the Second District Court of Appeal in Everton v. Willard.[7]

Actually, the decision of the Fifth District Court of Appeal in our case is also in conflict with the decisions of the Second District Court of Appeal in the following cases:

1. Evett v. City of Inverness;[8]
2. City of Cape Coral v. Duvall;[9]
3. Rodriguez v. City of Cape Coral.[10]

In its opinion in our case, the Fifth District Court of Appeal says:

> "We are called upon to determine whether the City of Daytona Beach should enjoy sovereign immunity for the actions of its police officers who stop a visibly intoxicated driver who is operating his motor vehicle in a careless and reckless fashion, but who do not arrest or otherwise detain the driver but permit him to continue operating the motor vehicle so that shortly thereafter and while still so intoxicated, he runs into and causes injury to an innocent third party."

In holding that the Complaint herein states a cause of action, said court states:

> "Suit by pedestrian against City to recover for injuries sustained when she was struck by vehicle operated by driver who prior to the accident was stopped by police officers but who, even though police officers knew driver to be intoxicated, was not detained or arrested was not barred on grounds of sovereign immunity, since police were not engaged in discretionary 'governmental function'."

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7. Everton v. Willard, 426 So. 2d 996 (Fla.App., 2 Dist; 1983)
8. Evett v. City of Inverness, Fla., 224 So.2d 365
9. City of Cape Coral v. Duvall, Fla., 436 So. 2d 136
10. Rodriguez v. City of Cape Coral, 451 So. 2d 513 (Fla.App. 2 Dist., 1984)

After applying the planning-operational dichotomy established in Commercial Carrier Corp. v. Indian River County,[11] to almost identical facts in Everton, the Second District Court of Appeal decided that a decision made by a law enforcement officer as to whether to arrest or otherwise detain a drunk driver involved an exercise of discretion and was, therefore, an implementation of basic planning level activity, such as to immunize a law enforcement officer from liability for death and injury sustained in collision caused by intoxicated motorist.

It is obvious that the decisions of said district courts of appeal in the Huhn and Everton cases are in direct conflict and it is this conflict which this Court must resolve.

It is our position that it was unnecessary for the District Courts of Appeal in both the Huhn and Everton cases to consider the planning-operational standard established in Commercial Carrier until it appeared from the facts that there existed between plaintiff and defendant a duty for the defendant to exercise reasonable care. In the absence of such duty, application of the planning-operational dichotomy to the facts of our case was premature.

As is the case in must factual situations wherein a municipal corporation is alleged to be liable to a citizen for damage, we should return to the decision of this Court in Wong v. City of Miami.[12] This case supports our contention that before the planning-operational dichotomy adopted in Commercial Carrier can be applied to the facts of our case, it must first appear that there is a duty on the part of the

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11. Commercial Carrier Corp. v. Indian River County, Fla., 371 So. 2d 1010
12. Wong v. City of Miami, Fla., 229 So. 2d 659

defendant to exercise reasonable care.

In Wong this Court reviewed a decision of the District Court of Appeal, Third District, wherein the opinion of said District Court was certified as being one that passes on a question of great public interest.

From the opinion of the District Court of Appeal it appears that plaintiffs sought to recover damages sustained by their property during a riot which occurred in 1968. It was contended by plaintiffs that were it not for the negligence of the City of Miami in withdrawing its police officers from the riot scene this damage would not have occurred.

In affirming an Order by the trial judge dismissing the Complaint based on this theory, the District Court of Appeal held:

> "At common law, governmental unit has no responsibility for damage inflicted upon its citizens or property as a result of riot or unlawful assembly.
>
> Common law in Florida has not been abrogated by any statute.
>
> City and County were not liable for damage to plaintiffs' businesses and property resulting during period of civil disobedience, riot and disregard for peace and dignity in area surrounding plaintiffs' businesses even if plaintiffs' businesses were not afforded adequate police protection."

In its opinion the District Court of Appeal specifically held that there was no liability under the common law for damage caused as a result of failure to provide adequate police protection.

In so doing, it did not even refer to the standards for judging liability of a governmental entity referred to in this Court's opinion in Commercial Carrier.

In Wong, the District Court of Appeal held as a matter of law that there was no duty on the part of a municipality to exercise reasonable care in providing police protection under the circumstances alleged in the Complaint. By analogy, this reasoning is applicable to the facts of our case because there is no duty on the part of a municipality under Florida law, or the common law generally, which imposes upon a law enforcement officer an absolute duty to arrest a person committing a crime.

The decision of said District Court of Appeal in Wong was reviewed by this Court on Petition for Writ of Certiorari. In its opinion discharging said Writ this Court held:

> "City and County were not liable for riot damage to plaintiffs' businesses.
>
> Inherent in right to exercise police powers is right to determine strategy and tactics for deployment of those powers; sovereign authorities ought to be left free to exercise their discretion and choose tactics deemed appropriate without worry over possible allegations of negligence."

Once again, as did the District Court of Appeal, the Supreme Court arrived at this conclusion without applying the old standards of governmental-proprietary or general duty-special duty which were rejected in the Commercial Carrier decision in favor of the planning-operational dichotomy which is now the law of Florida.

It is our position that the Supreme Court of Florida also found that there was no duty to the plaintiff under the facts alleged in the Complaint and, therefore, it was unnecessary to apply any test to determine the nature of function of the city which was alleged to have been performed in a negligent manner.

The impropriety of "leap frogging" the issue as to whether a duty existed and going directly to consideration of the nature of function which is alleged to have been negligent, is discussed in a dissent by Chief Justice Anstead to an opinion filed by the majority of the District Court of Appeal, Fourth District, in Manors of Inverrary XII v. Atreco-Fla.[13]

In Manors plaintiff sought to recover damages which were allegedly sustained by reason of the defendant city in failing to examine plans and specifications and properly inspect the premises before issuing a building permit and certificate of occupancy. As a result, it is alleged, the improvements failed to meet the requirements of the South Florida Building Code in numerous respects.

The city's Motion to Dismiss on the ground that it was entitled to sovereign immunity because the enforcement of the building code is a discretionary function was granted. From a final judgment dismissing the city, plaintiff appealed and said District Court of Appeal stated that the sole question argued on appeal is whether the activities of a city building inspector in approving plans, specifications and construction is a discretionary planning activity or operational activity.

The majority of the Court in Manors decided that the negligence of the city in failing to properly examine plans and specifications and properly inspect premises before issuing a building permit constituted operational activity of the city and, therefore, reversed the judgment of the lower court. Perceiving the question involved in

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13. Manors of Inverrary XII v. Atreco-Fla., Fla., 438 So. 2d 490 (Fla. App. 4 Dist., 1983)

Manors to be one of great public importance, the following question was certified to this Court:

> "Should the negligent conduct of a building inspector in approving plans, specifications, and construction that do not meet the requirements of the applicable building code be considered 'operational' conduct for which the municipality may be held liable in damages or 'discretionary' conduct to which sovereign immunity would apply?"

The majority of the Court in Manors apparently thought that the only question which they had to decide is whether the negligent conduct complained of could be considered "operational" or "discretionary" conduct. In his dissent, however, Judge Anstead took the position--which we do here--that a consideration of the nature of the function which is alleged to be negligent is premature until it is first determined that a duty to exercise reasonable care existed as between plaintiff and defendant, the breach of which was actionable.

In this regard Judge Anstead said:

> "Section 768.28, Florida Statutes (1975), simply waived the defense of sovereign immunity for the State, its agencies and subdivisions. There must still be a duty owed, a duty violated, and damages resulting therefrom, in order for there to be tort liability on the part of the government." (Underlining ours).

Judge Anstead said further:

> "The state of the law in Florida at the time the Legislature abolished the defense of sovereign immunity was, pursuant to the Modlin[14] decision, that there was no responsibility, in the case of public officials such as building inspectors,

14. Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967)

> that would give rise to liability. This absence of responsibility did not rest on the defense of sovereign immunity. If that is correct then it should be apparent that the Legislature, by abolishing the defense, did not intend to create a legal duty that did not then exist. The Legislature simply left the case law on this issue intact." (Underlining ours.)

Judge Anstead further noted that the decision of this Court in Commercial Carrier, rather than clarifying the law, has produced the same sort of confusion that the Commercial Carrier opinion concludes existed prior to the legislative abrogation of sovereign tort immunity.

We agree with Judge Anstead when he says:

> "After Commercial Carrier, and its rejection of Modlin, courts have appeared to lose sight of the requirement of the existence of a duty in considering liability, and have, instead, directed most of their attention to the difficult task of determining whether the action involved was 'discretionary' or 'operational' in accord with the nebulous standard set out in the case of Evangelical United Brethern Church v. State, 67 Wash. 2d 246, 407 P. 2d 440 (1965), and adopted in Commercial Carrier."

The solution to this problem is, we respectfully submit, that before attempting to apply the difficult planning-operational dichotomy adopted in Commercial Carrier, the Court should first consider whether a duty to exercise reasonable care existed in the first instance.

In order to determine whether under the common law of Florida there existed a duty which required a police officer to arrest or otherwise detain the driver of an automobile who is intoxicated, we should consider the applicable Florida statutes and case law.

The statute which authorizes a police officer to make an arrest for a felony or a misdemeanor without a warrant is F.S. 901.15 which provides: "WHEN ARREST BY OFFICER WITHOUT A WARRANT IS LAWFUL--"

"A peace officer may arrest a person without a warrant when:

(1) The person has committed a felony or misdemeanor or violated a municipal ordinance in the presence of the officer * * *." (Underlining ours.)

By using the word "may"--not "shall"--this statute gives a police officer a discretionary right, as opposed to an absolute duty, to make an arrest.

Another statute in which the word "may" is used insofar as the responsibility of a police officer for making an arrest is concerned is F.S. 79-.052 which provides: "CARRYING CONCEALED FIREARMS: OFF DUTY LAW ENFORCEMENT OFFICERS."

"(1) All full-time police officers, Florida Highway patrolmen, agents of the Department of Law Enforcement, and sheriff's deputies shall have the right to carry, on or about their persons, concealed firearms during off-duty hours, at the discretion of their superior officers, and may perform those law enforcement functions that they normally perform during duty hours, utilizing their weapons in a manner which is reasonably expected of on-duty officers in similar situations." (Underlining ours.)

Contrary to Huhn's contention, neither of these statutes impose an absolute duty to make an arrest. Both statutes provide that a police officer may or may not make an arrest in his discretion. Therefore, there is no statutory basis for Huhn's contention that the City's police officers had a duty to arrest the defendant Timmy Lynn Collins for the reason that he was driving while intoxicated.

As to Florida case law, the lower court relied upon the decision of the District Court of Appeal of Florida, Second District,

in Evett v. City of Inverness, Fla. wherein it was held:

> "City police officer who stopped but released allegedly intoxicated driver owed no duty, different from that owed to any member of the public, to plaintiff's decedent who was killed in accident involving allegedly intoxicated driver, and City could not be held liable since officer could not have been held liable."

In its opinion the Second District Court of Appeal said:

> "We hold that the City's police officer under the facts in this case can not be held personally liable for damages resulting from his negligence, if any, in the performance of his duties. If he did negligently permit the intoxicated driver to continue operating his vehicle on the public highway, he still owed no duty to plaintiff's deceased husband in any way different from that owed to any other member of the public. Therefore, as the police officer is not liable, the City can not be liable under the rule of respondeat superior."

In effect, the Second District Court of Appeal decided that:

1. A police officer had no duty to prevent an intoxicated driver from operating his vehicle.

2. The city which employed said police officer could not be held liable unless the police officer was liable.

As was the case in Evett, the City's police officers in our case had no duty to prevent the defendant Timmy Lynn Collins from operating his vehicle while intoxicated and, therefore, the lower court properly dismissed the Complaint herein for failure to state a cause of action.

Another Florida decision in which it was held that a peace officer has no duty to arrest or stop a person who is driving a motor vehicle in violation of the law, is Minard v. Department of Highway Safety and Motor Vehicles of the State of Florida, et al,[15]

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15. Minard v. Department of Highway Safety and Motor Vehicles of the State of Florida, et al., 418 So. 2d 288.

In Minard, plaintiff filed suit against a State Trooper alleging that said Trooper was liable for injuries which plaintiff suffered in a hit-and-run accident because the Trooper failed to stop the driver of the hit-and-run vehicle.

In affirming a summary judgment in favor of the Trooper, the District Court of Appeal of Florida, Third District, held:

1. The Trooper had no duty to arrest or stop the driver of the car in question.

2. The State agency which employed the Trooper could only be held liable if said Trooper were liable.

In both Minard and Evett Florida appellate courts held that the responsibility of a peace officer to arrest a person driving a motor vehicle in violation of the law was discretionary--not absolute--and, therefore, there was no duty on the part of the peace officer to make such arrest.

Since both Evett and Minard held that the governmental entity employing peace officer can not be liable to an injured third person unless the peace officer himself is liable, it is helpful to consider decisions in other jurisdictions on this subject.

ALR 3d[16] contains an annotation the subject of which is:

"PERSONAL LIABILITY OF POLICEMAN, SHERIFF, OR SIMILAR PEACE OFFICER ON HIS BOND, FOR INJURIES AS A RESULT OF FAILURE TO ENFORCE LAW OR ARREST LAWBREAKER."

In said annotation, it is stated that the general rule as to the liability of a peace officer for failure to enforce law or arrest

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16. 41 ALR 3d 692

lawbreaker is:

> "It is nevertheless generally held that the specific duty to preserve the peace is one which the officer owes to the public generally, and not to particular individuals, and that the breach of such duty accordingly creates no liability on the part of the officer to an individual who was damaged by the law breaker's conduct."
>
> In applying these principles to actions at common law attempting to establish the officer's personal liability for damage resulting from his failure to enforce the law, courts have generally rejected claims of individuals who suffered personal injury or property damage from the acts of traffic violators * * *."

The decision which is the subject of this annotation is Massengill v. Yuma County.[17]

In Massengill, plaintiffs brought wrongful death and personal injury actions against a sheriff and deputy sheriff following a head on automobile collision that resulted in the death of five persons and the total disability of a sixth. Two automobile drivers drove out of a parking lot in a reckless manner at a high rate of speed and proceeded down a highway side by side. While driving in this manner, they passed the patrol car of the deputy sheriff, who drove onto the highway, followed behind them until the time of the accident, but made no effort to apprehend them.

As does our Complaint, the Complaint in Massengill alleged that one of the drivers which the deputy sheriff did not apprehend was driving in a reckless manner, exceeding the speed limit, and driving while intoxicated.

In reinstating a judgment for defendant, the Supreme Court of

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17. Massengill v. Yuma County, 104 Ariz. 518, 456 P. 2d 376

Arizona held that the duty of the sheriff and deputy sheriff was one owed to the general public, not to the individual plaintiffs, and that no facts were pleaded that would bring the case into the realm of exceptions to the rule that failure of an officer to perform a duty to the public must be redressed, if at all, in some form of public prosecution.

In rejecting the plaintiffs' contention that the obligations of the public officers were duties owed personally to each and every individual member of the public, the court stated that the extent of potential liability to which such a doctrine could lead was staggering.

One of the decisions relied upon by the defendant in Massengill is Draper v. City of Los Angeles,[18] wherein it is held:

> "The police officer is not legally responsible for injuries to third parties caused by one who violates the law in the presence of the officer, whether the law breaker causes the injury while being pursued by the officer or after the officer fails to pursue and arrest him." (Underlining ours.)

Another decision wherein it is held that a police officer has no duty to arrest the driver of an automobile who is known to be intoxicated is Tomlinson v. Pierce,[19] wherein the facts are very similar to those of the instant case.

It was alleged that the officer had observed, accosted and interrogated one who was intoxicated and incapable of driving an automobile safely, that the officer knew he was about to do so, but that the officer negligently failed to arrest and detain him, and

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18. Draper v. City of Los Angeles, 206 P. 2d 46
19. Tomlinson v. Pierce, 2 Cal. Rep. 700

that he thereafter drove an automobile, colliding with plaintiffs' parents' automobile causing their deaths.

The defendants filed a demurrer to the Complaint which was sustained by the trial court and affirmed by the California District Court of Appeal on the ground that the Complaint was insufficient to state a cause of action in that it did not contain sufficient allegations of duty of police officer to arrest such individual.

In arriving at its decision said appellate court held:

> "An indispensable factor to liability founded upon negligence is the existence of duty of care owed by alleged wrongdoer to person injured or class of which he is a member.
>
> Power of police officers to arrest or not arrest is power in which discretion is vested in officer."

In its opinion the court noted that its attention had not been called to any statute in that State which attached liability upon a police officer for failure to make an arrest for claimed intoxication alone and to retain the person in custody. This was true despite the fact that a California Statute provided that among the duties of a police officer was a duty to preserve the peace and arrest and take before the nearest magistrate all persons who attempt to commit or have committed a public offense.

In its opinion said court emphasized that §836 of the California Penal Code, describing the circumstances permitting an arrest, provides that a peace officer "may" arrest under such circumstances. It is further said "if he '<u>may</u>' arrest, he '<u>may not</u>' arrest." (Underlining ours.)

Said court quoted with approval the following language from

Sherman and Redfield on Negligence:[20]

> "The liability of a public officer to an individual for his negligent acts or omissions in the discharge of an official duty depends altogether upon the nature of the duty to which the neglect is alleged. Where his duty is absolute, certain, imperative, involving merely the execution of a set task--in other words, is simply ministerial, he is liable in damages to anyone specifically injured, either by his omitting to perform the task, or by performing it negligently or unskillfully. On the other hand, where his powers are discretionary, to be exerted or withheld according to his own judgment as to what is necessary and proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them where no corruption or malice can be imputed, and he keeps within the scope of his authority." (Underlining ours.)

The law as stated in Tomlinson is directly applicable to the facts of our case. There is no Florida statute or decision which imposes upon a police officer a duty to arrest a person known by said police officer to be operating a motor vehicle in violation of the law. On the contrary, the applicable statutes and the Evett decision make the duty of a police officer discretionary.

Since under Florida law there is no duty to Huhn--as opposed to any other member of the general public--on the part of any City police officer to arrest the defendant Timmy Lynn Collins for driving his motor vehicle while intoxicated, the Complaint in our case does not state a cause of action and was properly dismissed by the lower court.

As is usually the case, the law applicable to the facts of our case makes sense. An intolerable burden would be placed upon a police officer if he could be held civilly liable for failure to

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20. Sherman and Redfield, Negligence, 3rd Edition, §156

arrest a person known by him to be driving a motor vehicle in violation of the law. If the onerous duty which Huhn seeks to impose in this case were accepted by this Court, the effect could well be a deterrent to the employment of police officers. Furthermore, the best interests of the general public would not be served by the adoption of the rule adopted by Huhn because a police officer, in order to protect himself, could well neglect more serious offenses in his zeal to save himself from civil liability in situations such as we have here.

In her Brief filed with the Fifth District Court of Appeal, it was contended by Huhn that the Evett decision no longer had any impact as precedent because of the promulgation of F.S. 760.28 which approved the doctrine of sovereign immunity and provided that a State agency may be held liable to the same extent as any private person.

This position was specifically considered in Massengill and rejected.

In that case the Supreme Court of Arizona noted that in an effort to reverse a judgment in favor of defendants entered by the lower court, plaintiffs discussed at length the doctrine of sovereign immunity and its impact on the court's decision. After doing so, however, said appellate court stated:

> "But nowhere in the record can we find any attempt by the defendants to envelop themselves in the cloak of immunity. Nor can they do so since this Court in most unquestionable terms relegated that archaic doctrine to the dust heap of history."

The Court then stated that the abolition of the doctrine of sovereign immunity did not in any way change the basic elements of

actionable negligence, the components of which are a duty owed to the plaintiff, a breach thereof, and injury proximately caused by such breach. These are the basic elements of any negligence action under Florida as well as Arizona law.

After concluding that the basic elements of any negligence action were applicable to the facts of the case in Massengill, the Court then stated that the general rule pertaining to governmental agencies and public officials is that:

> "If the duty which the official authority imposes upon an official is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution."

The following language taken from Cooley, Torts, 4th Edition,[21] is quoted with approval:

> "The law seems to be clear that if the duty discharged is a public duty and not a duty which the individuals owe to any particular person, then by the negligence or wanton or willful omission in the performance of this public duty, the officials are not liable except to the state."

The Court also said:

> "The duty must also be one owing to the person injured by his nonfeasance." (Underlining ours.)

After concluding that the duty to arrest was one owed to the general public and not to any specific individual, the Supreme Court of Arizona affirmed an Order dismissing the Complaint.

This is precisely the situation we have here. The defendant City has made no effort whatsoever here to envelop itself in the cloak of sovereign immunity. There is no question that F.S. 768.28 abolished

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21. 2 Cooley, Torts, 4th Ed., P. 385

this doctrine.

It is the position of the City here that the reason the Complaint herein was subject to dismissal by the lower court is that there are insufficient allegations therein to establish a duty on the part of the police officers to Huhn and a breach of said duty. This position is supported by Evett which, like our case, did not involve any contention whatsoever that the defendant City was not liable to the plaintiff because of the doctrine of sovereign immunity.

The Second District Court of Appeal in Evett specifically stated that it affirmed the Order dismissing the Complaint because there were insufficient allegations to establish a duty to the plaintiff as opposed to the general public.

Since there is no law in the State of Florida establishing a duty upon a police officer to arrest a driver of a motor vehicle known by said police officer to be intoxicated, the Complaint herein fails to state a cause of action and was properly dismissed by the trial court.

Even if this Court concludes that under Florida law a duty existed which required a police officer to arrest the driver of an automobile who was intoxicated, the Complaint in this action still should have been dismissed because of the following language in F.S. 768.28:

> "(1) In accordance with s. 13, Art. X, State constitution, the state for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property,

> personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act." (Underlining ours.)

By enacting the language which we have emphasized in the above statute, the Florida Legislature has adopted the so-called "parallel function" doctrine which we will now discuss.

F. S. 768.28 specifically provides that the doctrine of sovereign immunity is abolished subject to certain exceptions. One such exception is that a governmental entity is subject to liability for negligence only in those circumstances where a private person or entity would be liable to plaintiff in accordance with the general laws of the State of Florida. This is the "parallel function" doctrine.

We know of no Florida decision which recognizes the "parallel function" doctrine; however, the State of Idaho applied this doctrine when construing a statute similar to ours.

The Idaho statute[22] provides:

1. The doctrine of sovereign immunity is abolished subject to certain exceptions.

2. Every governmental entity is subject to liability for negligence where the governmental entity if a private person or entity would be liable for any damages under the laws of the State of Idaho.

This language also appears in Florida statute 768.28.

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22. I.C. §6-903(a), Laws of Idaho

The Supreme Court of Idaho in Chandler Supply Co. v. City of Boise,[23] had occasion to interpret this statute in an action brought against the City of Boise alleging negligence on the part of the City's fire department.

The facts involved in Boise were that firefighters employed by the City fought and extinguished a fire which resulted in substantial damage to property owned by plaintiff Chandler. Said plaintiff sued the City of Boise alleging negligence on the part of the City's fire department. A verdict was returned in favor of plaintiff and Boise appealed.

In its opinion said Court states that the so-called "parallel function" test is the first step to be applied in determining whether there has been a waiver of governmental immunity where the applicable statute provides that a governmental entity is liable only if a private person would be liable under the laws of the state in question.

Since our statute contains the identical language to the effect that a state agency or subdivision can not be held liable unless a private person would be liable to claimant under the general laws of the state, it is our contention that police protection provided by a municipality has no parallel in the private sector and, therefore, it was unnecessary for the District Court of Appeal in our case to interpret or apply the planning-operational exception to sovereign immunity created under Commercial Carrier.

If exercise of police powers by a municipality does not come within the intent and meaning of the "parallel function" test, then

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23. Chandler Supply Co. v. City of Boise, 660 P. 2d 1323 (Idaho 1983)

this language in the statute is rendered meaningless.

We urge this Court to accept the concept that there exists no "parallel function" in the private sector insofar as law enforcement is concerned and, therefore, it is unnecessary to consider whether such services are provided in the "planning" or "operational" function of government.

Should this Court dispense with the need for a decision as to whether a duty existed between Huhn and the City, and finds that the factual situation involved here passes the "parallel function" test, it is then appropriate to decide whether decisions made by city police officers as to whether an intoxicated driver should be arrested or detained is a "planning" or "operational" function of government within the standard established in Commercial Carrier.

After considering similar facts, the Fifth District Court of Appeal in our case and the Second District Court of Appeal in Everton applied the "planning-operational" dichotomy only to reach diametrically opposed conclusions as to the defendants' liability.

We urge this Court to accept the decision and rationale of the Second District Court of Appeal in Everton because to do otherwise would impose an intolerable burden upon the law enforcement officers of this State.

The police officer's lot is difficult at best. This Court should be extremely reluctant to reverse the law as stated in Everton. which is tried and true, in favor of the rule suggested by Huhn which would make every police officer in the State responsible in damages for failure to make an arrest for traffic violations committed in his presence.

The facts which the Second District Court of Appeal accepted as true for purposes of the defendant's Motion to Dismiss were that Azor Everton was seriously injured and Anton Trinko's daughter Renee was killed in a two car collision at an intersection in Pinellas County when the motor vehicle which they occupied was struck by a second vehicle operated by the defendant Marion Willard.

Approximately ten to twenty minutes before the accident, Pinellas County Sheriff's Deputy C. W. Parker stopped Willard and issued him a traffic citation or summons for making an improper U turn at another intersection.

While issuing the citation to Willard, Deputy Parker knew by his own observations, and by Willard's own admissions, that Willard had been drinking to some extent. However, Deputy Parker did not charge Willard with a driving offense relating to intoxication but instead, having issued the citation and having observed him while doing so, Parker allowed Willard to drive away.

In affirming the Order of the trial court dismissing said Complaints, the Second District Court of Appeal held:

> "That act of deputy sheriff in issuing a citation to motorist and, instead of charging him with a driving offense related to intoxication, allowing motorist to proceed without detaining or arresting him for intoxication was an act involving an exercise of discretion which was inherent both in nature of enforcement and in implementation of basic planning level activity, such as to immunize a deputy sheriff, as well as sheriff's department and county, from liability for death and injuries sustained in collision caused by motorist."

In arriving at its decision, the Second District Court of Appeal reasoned:

> "We, therefore, determine that the proper planning and implementation of a viable system of law enforcement for any governmental unit must necessarily include the discretion of the officer on the scene to arrest or not arrest as his judgment at the time dictates. When that discretion is exercised, neither the officer nor the employing governmental entity should be held liable in tort for the consequences of the exercise of that discretion."

Said Court also said:

> "Absolutely essential to a good, adequate and reasonable system of law enforcement as we now know it is its own operation level activities, and essential in those operational level activities is the discretion of a law enforcement officer under the circumstances of a particular case to decide whether or not to detain or arrest someone."

We respectfully submit the rationale of the Second District Court of Appeal in Everton should be accepted by this Court as making better sense than the decision of the Fifth District Court of Appeal in our case.

In resolving the conflict created by the Huhn and Everton decisions, this Court must necessarily answer the following question:

> "Should a law enforcement officer, when arriving at a decision as to whether or not an intoxicated driver should be arrested or otherwise detained, take into account the possibility that such decision is subject to being 'second-guessed' by a jury in a suit for damages?"

If this Court believes this question should be answered in the negative, then it should hold that such decisions are "discretionary" and the City is immune from liability therefor.

CONCLUSION

For the reasons stated, we respectfully request this Court to quash the decision of the district court and remand the case with directions that the trial court's Order dismissing the Complaint herein be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished, by mail, to Walter A. Ketcham, Jr., Esquire, Post Office Box 273, Orlando, Florida 32802; Leslie King O'Neal, Esquire, Post Office Drawer 1991, Orlando, Florida 32802 and Haas, Boehm, Brown & Rigdon, P.A., Post Office Box 6511, Daytona Beach, Florida 32022, this 9th day of November, 1984.

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